# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 15, 2011 |
| V | No. 295326<br>Wayne Circuit Court |
| DOMINIC DEVON SANFORD,<br><br>Defendant-Appellant. | LC No. 09-010160-FH |

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227(2), felon in possession of a firearm, MCL 750.224f(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 30 days' probation for the CCW and felon-in-possession convictions and two years in prison for the felony-firearm conviction. He appeals by right. We affirm.

Defendant first argues that the evidence was insufficient to prove that he possessed or carried a firearm. In reviewing a verdict reached in a bench trial, this Court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). This Court must review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proven beyond a reasonable doubt. *Id*. at 474. Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Felon in possession of a firearm and felony-firearm both require proof that the defendant possessed a firearm. *People v Peals*, 476 Mich 636, 640; 720 NW2d 196 (2006); MCL 750.224f(2); MCL 750.227b(1). Possession of a weapon may be actual or constructive and may be proven by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). "[A] defendant has constructive possession of a firearm if the location of the weapon is

known and it is reasonably accessible to the defendant." *Id.* at 470-471. CCW requires proof that the defendant carried a pistol. *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979); MCL 750.227(2). "Carrying" is similar to possession and denotes intentional control or dominion over the weapon. *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982). The word "carry" encompasses actual and constructive possession of a weapon. *Id*.; *People v Adams*, 173 Mich App 60, 62-63; 433 NW2d 333 (1988).

Two police officers testified that they saw defendant remove a dark-colored object from the waistband of his pants and reach into the window opening of a first-floor apartment. Within minutes, after defendant left the area, Officer Carter looked inside the window opening and found a loaded handgun on the window frame. No one else had been in the courtyard during that time. This evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the dark-colored object seen in defendant's possession was the gun that Officer Carter found in the window frame. The fact that defendant did not have the gun in his possession at the time he was taken into custody is irrelevant. It was sufficient that he was seen to be in actual possession of the gun at the time he committed the underlying felony of felon in possession, i.e., at the time he was ineligible to possess the firearm. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000).

Defendant next argues that he is entitled to a new trial because defense counsel was ineffective. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing, our review of this issue is limited to errors apparent in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, defendant must show "that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted). Counsel is presumed to have provided effective assistance, and defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *Id.* Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter and to investigate defenses relevant to the issues. *People v Grant*, 470 Mich 477, 486-487 (Kelly, J.), 498-499 (Taylor, J.); 684 NW2d 686 (2004). The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel if, due to the omission, counsel fails to uncover evidence that would have made a different result reasonably probable. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005); *Horn*, 279 Mich App at 37-38 n 2. The defendant must show that counsel's inadequate preparation resulted in not presenting valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Thus, counsel's failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense, *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), "one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Moreover, counsel's

"[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted).

Defendant contends that counsel was ineffective because she failed to call any witnesses other than defendant and did not present any documentary evidence. The record shows that defense counsel did not file a witness list, did not call any witnesses other than defendant, and did not present any documentary evidence. Nonetheless, there is nothing in the record to suggest that there were any witnesses who had any testimony to offer that would have substantially benefited defendant. The record shows that defendant stopped to speak with his friends before he entered the courtyard where the police officers saw him remove the gun from his person, but it does not indicate whether they knew if defendant were armed. The officers and defendant all agreed that during the time in question, Officer Carter and defendant were the only persons who entered the courtyard, so there is nothing to suggest that there were any eyewitnesses to the offense other than the three persons who testified at trial. Defendant testified that a woman who lived in apartment #5 arrived after the gun had been discovered, but there is nothing in the record to indicate that she had any information about the gun that would suggest it had been in the window frame before defendant entered the courtyard. Thus, there is no record support for defendant's claim that defense counsel was ineffective for failing to discover and present witnesses. Similarly, defendant has not identified any documentary evidence relevant to this case that counsel failed to discover and present. Therefore, defendant has failed to prove the factual predicate for his claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6-7.

Defendant also contends that counsel was ineffective for failing to develop his testimony to establish why he went to the apartment building and why, after looking at the police, he walked to apartment #5. Defendant's testimony indicated that he went to the apartment building to visit his friend, Eric, but saw people he knew outside and stopped to talk to them. Counsel had no reason to ask defendant to explain why he looked at the police before walking over to the apartment because defendant testified that he did not observe the police outside before he went to Eric's apartment. Once the other people outside the building left, defendant had no reason to loiter on the sidewalk, so he proceeded to Eric's apartment. The record does not show that counsel's development of defendant's testimony was objectively unreasonable.

Defendant further contends that counsel was ineffective because she did not adequately impeach the police officers. Decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *Rockey*, 237 Mich App at 76. The record shows that defense counsel cross-examined both officers about their ability to perceive defendant and elicited testimony that they did not see a gun on defendant's person, did not know what the object was that he removed from his waistband, and could not see defendant's hand after it entered the window opening. There is nothing in the record to indicate other lines of questioning that could have been pursued, and defendant has not suggested what other questions counsel could have asked that would have further undermined

the officers' credibility. Thus, the record does not show that the extent to which counsel impeached of the officers' testimony was objectively unreasonable.

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter